

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

MICHAEL PRENDERGAST,

Plaintiff,

vs.

CIV 07-1265 CG/LFG

FUNDAMENTAL LONG TERM
CARE HOLDINGS, LLC, et al.,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION TO CORRECT FINAL JUDGMENT

THIS MATTER is before the Court on Plaintiff's Motion to Correct Final Judgment pursuant to FED. R. CIV. P. 60(a). (Doc. 309). Although the Court is inclined to agree with Defendant that the motion should have been brought under FED. R. CIV. P. 59(e), the motion will be DENIED at this time for lack of leave by the Tenth Circuit Court of Appeals as required by FED. R. CIV. P. 60(a).

Rule 60(a) allows a court to correct a mistake in a judgment, "[b]ut after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave." *Id.* The appeal in this case was docketed on November 10, 2009. (Doc. 315 at 1.) While Plaintiff's motion (Doc. 309) was filed on October 27, 2009, prior to the docketing of the appeal, Defendants' response (Doc. 325) and Plaintiff's reply (Doc. 331) were filed on November 18, 2009 and December 7, 2009, respectively—after the appeal was docketed. Because an appeal has been docketed and is pending in this case, this Court is without jurisdiction to rule on the motion absent leave by the Tenth Circuit Court of Appeals.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Correct Final Judgment (Doc. 309) be **DENIED**.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'Carmen E. Garza', with a long horizontal flourish extending to the right.

THE HONORABLE CARMEN E. GARZA
UNITED STATES MAGISTRATE JUDGE